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October 31, 2017

F. Franklin Amanat, Esq.
United States Attorney's Office
Eastern District of New York
Civil Division
271A Cadman Plaza East
Brooklyn, New York 11201-1820

Re: United States v. Barclays Capital Inc., et al., Civ. No. 16-7057

Dear Mr. Amanat:

Third Parties Bank of America, N.A. ("BANA") and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("ML," and collectively, the "Bank"), each served with four Rule 45 Subpoenas (collectively, the "Subpoenas") in the above-captioned matter, hereby respectfully request the Court to reconsider its Memorandum and Order of October 18, 2017, which declined to enter the protective order submitted jointly by the Parties (the "Original Order") and directed the entry of a revised protective order (the "Revised Order") with respect to paragraphs 54 and 55 of the protective order regarding the production and use of borrower information (the "Borrower Provisions"). The Borrower Provisions in the Revised Order would impose a significant burden on the Bank, which is not a party to this matter, in its efforts to comply with the Subpoenas.

The Original Order provided robust safeguards against the disclosure of certain borrowers' "nonpublic personal information" ("NPPI"). NPPI is contained in a significant portion of the information requested by the Subpoenas, which request information for over 2,000 loans. The NPPI would have been disclosed only to certain individuals, used only for the

purposes of the litigation at hand, subject to a confidentiality designation, and returned or destroyed at the conclusion of the litigation. The Borrower Provisions in the Original Order would have also constituted a court order permitting the Bank to produce any NPPI located in the materials called for under the Subpoenas without notification to borrowers, an approach that numerous other courts have found good cause to include in protective orders in litigations involving residential mortgage backed securities. The Revised Order retains the safeguards, but would not constitute a court order permitting production of NPPI without notification, resulting in the Bank being required to provide notice to, or seek consents from, individual borrowers across the country who have NPPI in the documents covered by the Subpoenas.

This change would significantly increase the burden associated with the Subpoenas. To respond to the Subpoenas under the Revised Order, the Bank would have to first review materials responsive to the Subpoena requests for loan files in order to determine whether they contained any NPPI. Next, the Bank would have to determine the specific jurisdiction(s) whose law governed such NPPI. Then, the Bank would have to review the law of that jurisdiction(s) to determine whether it was permitted to produce the NPPI absent notice to the borrower or a court order facilitating the production. For several important jurisdictions – notably, California and Illinois – it appears likely, based on the parties' prior submissions, that the Bank would not be permitted to produce the NPPI absent notification or court order. In any event, for every jurisdiction, the Bank would have to carefully consider the relevant statutes, and the Bank may conclude that there are jurisdictions beyond those identified by the parties that also require notification or a court order prior to producing NPPI.

Many of the loans at issue in this case are at least ten years old, and the burden associated with locating and notifying individual borrowers who took out loans so long ago is substantial. The Bank could bypass this burden only through undertaking the alternative burden of seeking a court order permitting the production – in essence, asking the court's permission to comply with the Subpoenas, when the same result could be reached through the language in the Original Order. In addition to the burden imposed on a non-party to this litigation, this additional step would divert judicial resources from more pressing and substantive issues. Furthermore, the Bank would have to take these steps even for information it may have produced in earlier litigations, including, *inter alia*, in *United States v. McGraw Hill Cos.*, Civ. No. 13-779, C.D. Cal., in which the Bank responded to Rule 45 subpoenas pursuant to a protective order with relevant provisions similar to those of the Original Order.

In sum, the burden from the changes to the Borrower Provisions in the Revised Order would be substantial even if the Bank were a party to the case, which it is not. In light of

both the Bank's non-party status and the Original Order's significant safeguards, the obligations of the Revised Order would impose a serious and undue burden on the Bank.

Sincerely,

Robin Bergen /MJR-M

Robin Bergen

cc: Susan Kivelson
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